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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

ORIGINAL
FILE

Amendment of Parts 65 and 69 of
the Commission's Rules to Reform
the Interstate Rate of Return
Represcription and Enforcement
Processes

CC Docket No. 92-133

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Summary of Comments

USTA supports simplification and streamlining of Part 65 in a manner consistent with the Communications Act. Experience with Part 65 indicates that this would be in the public interest.

Part 65 Procedure: Part 65 reform must be consistent with the requirements of section 205 of the Act. USTA encourages retention of the paper hearing process and procedural change that eliminates recognized problems. As explained in the comments, a simple notice and comment procedure is inadequate as a matter of law and policy, and does not satisfy the applicable legal standard. This is particularly true where the determination is essentially that of a single contested factual issue.

Central to the revision of Part 65 procedures is maintenance of a core structure of Direct Case, Responsive Case and Reply/Rebuttal. Procedural safeguards must remain available, but experience points to alternatives, set out in the comments, that will eliminate unnecessary delay and consumption of Commission and carrier resources.

A trigger mechanism for represcription is of particular significance in revising Part 65. The trigger must be agreed by the Commission and by affected carriers to meet a requisite level of probative value to be implemented at all, and must operate fairly in each direction. At pages 33-34, USTA suggests a semi-

automatic trigger mechanism in these comments that utilizes a six-month moving average of Aa public utility bonds, triggering comment from carriers as to the need for represcription, when the average moves 150 basis points from a base point (set at the conclusion of this proceeding) for six consecutive months. An alternative is proposed if the Commission elects a non-discretionary, automatic trigger.

Part 65 Methods: As a general rule, USTA advocates flexibility in the Part 65 rules involving the development of substantive data.

USTA objects to the adoption of a conclusive capital structure or any conclusive methodology in Part 65 for developing cost of equity. The adoption of fixed measures of the components of cost of capital within Part 65 will inevitably lead to error and a mismatch of the rules with market facts, financial theory and a carrier's actual circumstances. Prior experience makes this clear. As shown in the comments and supporting expert testimony, flexibility would aid in simplification of Part 65.

In line with this view, USTA believes a specific rule or risk surrogate for the exchange carriers is not needed at this time. The suggested options are either not workable, or not as good as a rule that calls simply for use of firms of comparable risk.

With cost of equity in particular, a fixed methodology will prove to be erroneous. An analyst should be free to use any relevant tool to develop an estimate or range of estimates. Cost of equity determination is a particularly contentious part of the represcription process. Current theories and new applications must have room to prove themselves and be used. A static process is inadequate.

USTA addresses a number of specific related issues raised by the Notice: zone of reasonableness, quarterly compounding, flotation costs and aspects of risk premium analysis. USTA addresses the Commission's analysis and recommends flexibility in all return on equity options.

To help simplify the Part 65 substantive structure, USTA recommends a specific procedure for developing capital structure and cost of debt. This procedure focuses on the availability of data in the Form M reports of the Bell Operating Companies (BOCs), a group that is preferable to any other, including a composite of Tier 1 exchange carriers. USTA explains in detail how this can take into account a number of peripheral issues raised in the Notice, such as the handling of preferred stock, short-term debt and zero-cost items; how the Commission can assure itself of an accurate composite; and how this can save time and expense for all involved. A conclusive capital structure is not advisable; an accurate and simplified composite

of the BOCs is best. Consistent with this view, a conclusive general cost of corporate debt is also inappropriately restrictive.

USTA explains how a unitary rate of return remains a significant aspect of interstate rate of return prescription, and how it continues to be in the public interest to maintain it.

Monitoring and Enforcement Procedures. USTA assesses the Act as it has been interpreted in a consistent line of recent cases that have resolved earlier questions about "automatic refund" rules. Rate of return prescriptions should be enforced prospectively. Retroactive refunds are not allowed. Similarly, automatic refund mechanisms are not permissible where underearnings cannot be balanced with overearnings. Fines also are not permitted for the mere act of achieving successful earnings results that may exceed the prescribed rate of return.

The Act provides for a complaint process. Any complaint process also should take into account underearnings for the period covered by a customer's complaint.

If there is a mechanism adopted, USTA explores some conditions that are essential to small carriers, such as a wider buffer zone and sharing possibilities within incentive regulation.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of:)
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Amendment of Parts 65 and 69 of)
the Commission's Rules to Reform) CC Docket No. 92-133
the Interstate Rate of Return)
Represcription and Enforcement)
Processes)

**COMMENTS
OF THE
UNITED STATES TELEPHONE ASSOCIATION**

The United States Telephone Association (USTA) respectfully submits these Comments on the Commission's Notice of Proposed Rulemaking and Order (Notice) in this proceeding, 7 FCC Rcd 4688 (1992). The Notice seeks ways to better match the Commission's represcription and enforcement processes to the Communications Act and the "dramatically" changed telecommunications industry and regulatory environment.¹

The United States Telephone Association (USTA) is the principal national trade association of the local telephone industry. Its membership of over 1,000 exchange carriers provides most of the local telephone lines in the United States. USTA has consistently participated in the Commission's various rate of return proceedings, and the Notice will significantly impact USTA's rate of return regulated members.

¹ Notice at ¶ 1.

**I. USTA SUPPORTS EFFORTS TO REVISE PART 65 AND TO SIMPLIFY IT
IN A WAY THAT IS CONSISTENT WITH THE COMMUNICATIONS ACT.**

The Commission states in the Notice that its proposals seek to simplify the rate of return represcription and enforcement processes so they do not impose unnecessary burdens on the telecommunications industry.² It tentatively concludes that simplified procedures and methodologies will facilitate its efforts to ensure that rates are just and reasonable.³

USTA strongly agrees that it is in the public interest that Part 65 procedures be revised. Both the Commission and the industry have recognized since at least 1987 that Part 65 is flawed.⁴ In practice, Part 65 has been shown to contain procedural ambiguity and unworkable time limits. More important, the substantive demands of Part 65 operate to deter the filing of relevant and useful information related to the core issue for which Part 65 exists - the prescription of a rate of return. Because of the limits of Part 65, it was necessary in 1990 for the Commission to take specific action to accommodate deficiencies in the rules.⁵ Simplification of the rules is justified by events since the rules

² Notice at ¶ 8.

³ Notice at ¶ 16.

⁴ Notice of Proposed Rulemaking, Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 87-463 (Refinements of Methodologies Proceeding), 2 FCC Rcd 6491 (1987) (1987 Notice).

⁵ Order, in Refinements of Methodologies Proceeding, and in Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Docket No. 89-624 (1990 Represcription Proceeding), 5 FCC Rcd 197, 202 (1989) at ¶ 47-48 (1990 Represcription Commencement Order).

were first adopted. Details in the rules are no longer relevant. Unnecessary specificity in parts of the rules has rendered the rules inaccurate. A number of steps in Part 65 must be better targeted to the "paper hearing" process.

However, simplification of Part 65 cannot extend beyond the boundaries of due process and fundamental fairness. Nor can it put in place procedures that are not consistent with the Communications Act. While USTA agrees that simplification has merit, there are avenues by which it can occur that maintain procedural fairness and also comply with the language and intent of the Act. Thus, USTA does not subscribe to the Commission's stated "simplification" of "methodologies" if it would institutionalize a Commission-favored methodology where that would prevent use of other recognized methodologies.⁶

A carefully developed revision of Part 65 can have a number of beneficial effects. There would be less procedural uncertainty for affected carriers. They could anticipate and plan for change in the authorized interstate rate of return in line with market indicators. Finally, a forward-looking revision would accommodate evolving change in the way cost of capital is developed. The revision suggested below by USTA would provide flexibility in Part 65 administration and practice. It is supported by William E. Avera, whose testimony is attached to these comments.

⁶ There can be some simplification, discussed below, where a reliable methodology can be agreed upon. USTA suggests this in the area of capital structure, for example, but finds it unworkable in the cost of equity area.

II. USTA SUPPORTS A UNITARY RATE OF RETURN.

The Commission states that it proposes no change in its policy of prescribing a unitary overall rate of return.⁷ USTA agrees with the Commission that it remains appropriate to maintain a unitary rate of return.

Continuation of a unitary rate of return has significant public interest value for a number of reasons. Until the Commission's actions in CC Docket No. 84-800, the unitary nature of the rate of return was never placed in question. And in that proceeding, the Commission, after taking comment on the possibility of different rate of return groupings, and conducting extensive analysis of the characteristics of the exchange carrier industry, elected to confirm the continued value of a unitary rate of return.⁸

That conclusion has been reinforced in the years since it was reached. Certainly, there have been efficiencies and administrative benefits in represcription decisions, with no documented cost to interstate ratepayers. There remain over 1300 exchange carriers and 1400 exchange carrier study areas with considerable diversity of size, network characteristics and configuration, customer base, financial structure and ownership structure. Any groupings of exchange carriers would require the Commission to initiate and complete a uniquely focused Part 65

⁷ Notice at ¶ 18.

⁸ Memorandum Opinion and Order, 84-800 Phase II Proceeding, 104 FCC 2d 1404 (1986) at 5-6, ¶ 10-11.

proceeding, and there is no basis to assume that the groupings would be stable over time.⁹ The basis for any such groupings would quickly erode as normal industry change progressed.

Small and midsize exchange carriers provide only 6% of the industry's access lines in the aggregate. Almost all lack publicly traded stock or rated debt. Therefore, neither they nor the Commission are in the position of calculating a "market" cost of capital in the absence of a reasonable surrogate such as the Bell Operating Companies (BOCs). The data necessary to calculate multiple rates of return is not available from any source for the more than 700 average schedule companies.¹⁰ Most such carriers lack the resources to engage in the detailed work that would become necessary if the Commission were to undertake the prescription of multiple rates of return for rate of return carriers. Enormous new cost would result for both the Commission and the carriers. For all, including the Commission and the public, the cost would exceed the benefit.

Even though the various company characteristics are diverse, the business risks facing the exchange carrier industry in the provision of interstate access do not differ in ways that justify different rate of return classifications.¹¹ A unitary rate of

⁹ Report and Order, 84-800 Phase II Proceeding, 51 Fed. Reg. 1796 (January 15, 1986) (84-800 Phase II Order) at ¶ 7.

¹⁰ Reply Comments of USTA in Refinements of Methodologies Proceeding, filed December 18, 1987 at 17.

¹¹ See discussion below at pp. 44-45.

return using an appropriately developed capital structure and cost factors reflects these risks most accurately, and the suggestions in these comments provide a workable means to measure the needed rate of return accurately and efficiently within the structure of the Act.¹²

III. REVISION OF PART 65 CONSISTENT WITH THE ACT MUST FOCUS ON STREAMLINING THE PAPER HEARING PROCESS TO ACHIEVE THE BULK OF SIMPLIFICATION.

A. A Simple Notice and Comment Procedure is Inadequate as a Matter of Law and Policy to Achieve the Intended Goals of This Proceeding.

The Act itself was adopted with the expectation that when the Commission believed that the rate of return required a change, it would undertake to commence a represcription and would bear the burden of justifying any change it sought to make. In contrast, when a carrier believed the rate of return required a change, it would petition the Commission to commence a represcription and would bear the burden of justifying a change. It is only since 1986 that this expectation has been changed, so that there is now a framework within which represcription is commenced and ultimately concluded. This Notice would significantly alter that framework, moving farther from the structure of the Act.

While USTA is willing to seek simplification along with the Commission, any result must maintain the fundamental protections the Act anticipates. Therefore, USTA disagrees with the notice and comment process proposed by the Commission at ¶ 27 of the Notice, as explained below. That base structure is inconsistent with the

¹² 84-800 Phase II Report and Order at ¶ 7.

nature of a rate of return prescription and the expectations of the Act. Simplification can be achieved in other ways that are consistent with the Act.

1. The Proposed Notice and Comment Procedures Are Legally Deficient and Unfair.

In its Notice, the Commission tentatively concludes that the "paper hearings" procedure set out in Part 65 of its Rules "goes far beyond what is necessary" both practically and legally.¹³ Based on that tentative conclusion, the Commission proposes to replace the paper hearing procedures with the notice and comment procedures permitted by § 553 of the Administrative Procedure Act (APA) in informal rulemaking proceedings.¹⁴

The Notice correctly points out that the APA categorizes ratemaking as rulemaking.¹⁵ What the Commission ignores is that Section 205 of the Communications Act permits prescription only after a "full opportunity for hearing." Where contested issues of fact, and factors underlying a return prescription typically are in dispute, notice-and-comment procedures do not satisfy the "full opportunity for hearing" requirement.¹⁶ Moreover, the

¹³ Notice at ¶ 27.

¹⁴ Notice at ¶ 34. The APA divides rulemaking between "informal" and "formal." When rules are required by statute to be made "on the record after opportunity for an agency hearing," the APA requires formal rulemaking, that is, a "trial-type hearing." Otherwise, an agency can utilize the "informal" rulemaking procedures specified in § 553 of the APA, that is, notice and comment procedures.

¹⁵ Notice at n.26; see APA § 551(4).

¹⁶ See pp. 11-18, below.

adjudicatory nature of a rate prescription is recognized by other ratemaking agencies and was recognized by this Commission until the break-up of AT&T.¹⁷

The need for more robust procedures than notice and comment extends beyond the simple legal requirement; they are needed to assure a complete record for the Commission when it prescribes a new rate of return. This is not to suggest that the current procedures cannot be streamlined and paper hearings made more efficient. They can be. What the Commission cannot do, and should not do even if it could, is use simple notice and comment procedures to prescribe rates of return.

The remainder of this section discusses the legal standards applicable to the Commission's proposed procedures. The next part of these comments proposes revisions to current Part 65 procedures which will achieve the Commission's streamlining objective and, at the same time, assure development of a complete record, particularly where critical data and facts are contested.

**(a) The Commission's Proposed Procedures
Violate The Intent of the Act and
Established Legal Standards.**

The Commission's rate-of-return prescription rules currently provide for submission of evidence, including the written testimony of expert witnesses, discovery and (if necessary) cross-examination

¹⁷ See pp. 16-17 below.

of witnesses.¹⁸ Based on that evidentiary record, the Commission prescribes a rate of return. When it adopted these procedures, the Commission acknowledged that it avoided deciding whether it could lawfully prescribe a rate of return using notice and comment procedures.¹⁹

Because the Notice focuses on notice and comment standards, it ignores that the statutory scheme contemplates that the burden of proving the reasonableness of a revised return is very different depending on whether the carrier or the Commission initiates the proceeding. If a carrier initiates a represcription request, then the burden falls on it. If the Commission initiates an investigation -- or establishes a standard for initiating a review of existing return level -- it bears the burden of going forward and the burden of proof.²⁰

The Commission's proposed triggering mechanism would operate to compel carriers to come forward to justify their existing return level. Where a reduction in the return is envisioned, the Commission's proposal then impermissibly shifts the burden of proof

¹⁸ 47 C.F.R. §§ 65.102, 65.103 (discovery), 65.104 (cross-examination).

¹⁹ Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, CC Docket No. 84-800, 50 Fed. Reg. 33,786, 33,798 ¶ 107 (Aug. 21, 1985) (84-800 Phase II Proceeding) (84-800) (Supplemental Notice); 51 Fed. Reg. 1796 (Jan. 15, 1986) (84-800 Phase II Order) on recon., 104 FCC 2d 1404 (1986).

²⁰ See, e.g., New York PSC v. FERC, 642 F.2d 1335, 1345 (D.C. Cir. 1980); Sea Robin Pipeline Co. v. FERC, 795 F.2d 182, 184 (D.C. Cir. 1986).

from the Commission to the carriers and flips the burden standards specified by Congress. Not surprisingly, similar triggering devices have been set aside on judicial review.²¹

The Commission's proposed notice and comment procedures exacerbate the problem. Under the proposed procedure, the Commission, which bears the burden of proof, is never obliged to come forward with evidence to support a downward revision in its prescribed return. In addition, the Notice would add to that problem. The Common Carrier Bureau (Bureau) could have wide discretion as to when to initiate a represcription proceeding, and be set in the position of an adversary. Moreover, that adversary, under the proposed rules, would filter all discovery and, thus, control the data (other than comments) that become part of the record. There would be an automatic incentive to require data that supports its predisposition that the return should be lowered. The proposed rules do not contemplate (much less require) that the party bearing the burden of proof of a lower rate of return (the Commission) submit solid evidence to support its position. Yet, the adversary-Bureau would act as the decisionmaker for all intent and purposes.

The core of the Act assumes that ratepayers, e.g., the sophisticated interexchange carriers, who believe an existing return prescription exceeds the zone of reasonableness, can file a

²¹ See New York PSC v. FERC, 866 F.2d 487 (D.C. Cir. 1989) (overturning a requirement that a pipeline file new rates every three years to reflect contemplated reductions in the pipeline's single asset rate base).

§ 205 complaint. When economic conditions suggest an increase in the return is warranted, the Act assumes a carrier-initiated filing.

**(b) The Proposed Notice and Comment Procedures
Would Not Satisfy Minimum Legal Standards.**

Section 205 of the Communications Act grants the Commission the authority to prescribe a rate of return.²² That section, however, permits a prescription only "after full opportunity for hearing." 47 U.S.C. § 205. In *Nader v. FCC*, the court observed:

"The essential elements of a valid prescription order are a full opportunity to be heard and a finding that the action taken is just and reasonable."²³

As a general rule, notice and comment procedures can satisfy the requirement for a "hearing" when rulemaking is involved. The Notice is correct to that extent. However, ratemaking, although classified as rulemaking under the APA, presents an exception to that rule. While a "trial type hearing" may not be required, something more than notice and comment is legally necessary in contested rate proceedings. Thus, the Commission's proposed notice and comment procedures do not satisfy Section 205's "full opportunity for hearing" requirement. Moreover, a rate of return prescription using only notice and comment procedures may fall short of satisfying constitutional standards.²⁴

²² *Nader v. FCC*, 520 F.2d 182, 204 (D.C. Cir. 1975).

²³ *Nader*, 520 F.2d at 204 (emphasis supplied).

²⁴ See *Morgan v. United States*, 298 U.S. 468, 479-80 (1936), 304 U.S. 1, 20-21 (1938).

Equally important, sound decisionmaking and fairness considerations caution against relying on notice and comment procedures in a rate of return prescription proceeding. Such proceedings are uniquely fact-driven. Indeed, the purpose is to find a fact rather than to make a policy. When a proceeding concerns a matter as important (and controversial) as an exchange carrier's cost of equity capital, discovery and an opportunity for examination of an opponent's or agency's expert on contested factual matters is an indispensable ingredient of fairness. They are effective and efficient means to reveal "logical inconsistencies, to explore a witness' premises and assumptions, and to reveal the value judgments behind purportedly objective statements."²⁵ Moreover, just knowing that discovery and the possibility of examination exists will assure accurate data and better preparation by experts.

**(1) Where Contested Factual Issues
Must Be Resolved, Notice and
Comment Procedures Are Legally
Insufficient.**

Florida East Coast Railway,²⁶ which involved setting incentive surcharges to solve a perceived nationwide boxcar shortage, holds that ratemaking normally is subject to informal rulemaking procedures, which includes notice and comment

²⁵ Kestenbaum, Rulemaking Beyond APA: Criteria for Trial-Type Procedures and the FTC Improvement Act, 44 Geo. Wash. L. Rev. 679, 694 (1976).

²⁶ United States v. Florida East Coast Ry. Co., 410 U.S. 224 (1973).

procedures.²⁷ Nevertheless, that Court tacitly held that more than notice and comment procedures are required where contested factual issues exist in a ratemaking context. In that case, the Court remanded the question whether the Interstate Commerce Commission (ICC) abused its discretion in denying requests for an oral hearing. The Court suggested that it may be arbitrary to deny a request for evidentiary hearings even where such hearings are not statutorily required. In other words, although the APA does not require a "trial-type hearing" in a ratemaking proceeding, a ratemaking agency may abuse its discretion if it denies requests for procedures that involve evidentiary procedures.²⁸ As Professor Davis observed:

Notice and comment procedure can be limited to publishing proposed rules and receiving written comments; that is all that § 553 [the informal rulemaking section], on its face, requires. But courts have either interpreted § 553 to require more, or have created common law to supplement the requirements of § 553²⁹

In practice, federal ratemaking agencies have routinely required more than notice and comment in prescribing rates. The Federal Energy Regulatory Commission (FERC) uses trial-type hearings in prescribing pipeline rates. The ICC uses modified

²⁷ See *American Tel. & Tel. Co. v. FCC*, 572 F.2d 17, 22 (2d Cir. 1978).

²⁸ Professor Nathanson, in a seminal article criticizing the Florida East Coast Railway reasoning, concluded that there is no intellectual or significant policy justifications for exempting major regulatory functions, especially ratemaking, from the requirements of formal rulemaking. Nathanson, *Probing the Mind of the Administrator: Hearing Variations and Standards of Judicial Review Under the Administrative Procedure Act and Other Federal Statutes*, 75 Colum. L. Rev. 721, 768-70 (1975).

²⁹ Davis, *Administrative Law Treatise* § 6:19 (1978 ed.) (emphasis supplied).

trial procedures in setting rates for railroads still subject to cost of service regulation.

Finally, the D.C. Circuit has recognized that ratemaking is the type of rulemaking that "require[s] more" than notice and comment procedures when disputed issues of material fact must be decided.

In Mobil Oil Corp. v. FPC, . . . [the D. C. Circuit] recognized that informal rulemaking under § 553 might require certain adversary procedures akin to adjudications or formal rulemaking when circumstances, such as often obtain in rate-making cases, made them appropriate.³⁰

In Mobil Oil, the petitioner argued that the Federal Power Commission (FPC) improperly utilized notice and comment rulemaking procedures to fix minimum rates for certain services. Citing Florida East Coast Railway, the Court rejected the argument that a trial-type proceeding was required. Nevertheless, the Court went on to hold that more than minimum notice and comment procedures were necessary to test the agency's contested factual determinations. Even allowing for the agency's considerable freedom in structuring procedures, the Court noted

There must . . . be some mechanism whereby adverse parties can test, criticize and illuminate the flaws in the evidentiary basis being advanced regarding a particular point. The traditional method of doing this is cross-examination, but the Commission may find it appropriate to limit or even eliminate altogether oral cross-examination and rely upon written questions and responses.³¹

³⁰ Action for Children's Television v. FCC, 564 F.2d 458, 470 n.19 (D.C. Cir. 1977) (emphasis supplied), citing Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973)).

³¹ Mobil Oil, 483 F.2d at 1262-63.

The Court suggested the use of interrogatories as means of reducing or eliminating the need for cross-examination.³² This, of course, is precisely the objective of the Commission's current rules which provide for discovery and, then, cross-examination as only a last resort. See 47 C.F.R. §§ 65.103, 65.104.

The Commission would scrap those discovery procedures under the notice and comment procedure.³³ In short, the current discovery procedures barely satisfy existing legal standards. The proposed rules would cross the line. They would not satisfy those standards.

Not only are parties entitled to discovery of other parties, but if the Commission intends to propose a rate of return in a notice, Mobil Oil makes clear that the Commission must make available all the data and studies upon which it relies. If that information appears to be "suspect," parties are entitled to some form of adversary discovery and, possibly, cross-examination of the agency.³⁴

Again, if the Commission proposes to change the return, it bears the "burden of proof" and that includes "adduc[ing] substantial evidence" to show that the existing rate is

³² Mobil Oil, 483 F.2d at 1253.

³³ Notice at ¶¶s 35-37.

³⁴ See also American Pub. Gas Ass'n v. FPC, 498 F.2d 718, 723 (D.C. Cir. 1974).

unreasonable.³⁵ The terms "burden of proof" and "substantial evidence" are uniquely the language of adjudication, not the language of notice and comment rulemaking. Accordingly, the burden of proof requirement, particularly when coupled with § 205(a)'s "full opportunity for hearing" requirement, means something more than notice and comment procedures are required.³⁶

**(2) Notice And Comment Procedures
Would Compromise The
Commission's Ability To Assure A
Complete Record.**

The Commission should also assess whether sound decisionmaking and considerations of fairness indicate that opportunities for discovery, cross-examination or oral hearings are appropriate:

Administrative procedures fail of their fundamental purpose if the goal of expedition is bought at the sacrifice of reasoned decision-making and substantial fairness to the parties concerned.³⁷

From that perspective, carriers and other parties are entitled to an opportunity not only to present their view to the Commission, but to criticize, probe, and respond to competing views, including the Commission's "evidence." When the proceeding concerns findings of specific facts as important and controversial as a carrier's required return on capital, the probing of experts and their data

³⁵ See *ANR Pipeline Co. v. FERC*, 771 F.2d 507, 513-14 (D.C. Cir. 1985).

³⁶ *Morgan v. United States*, 304 U.S. 1, 19 (1938) ("Congress, in requiring a 'full hearing,' had regard to judicial standards, -- not in any technical sense but with respect to those fundamental requirements of fairness which are the essence of due process").

³⁷ *Municipal Electric Util. Ass'n v. FPC*, 485 F.2d 967, 973 (D.C. Cir. 1973).

is an indispensable ingredient of fairness. It is recognized as an effective and efficient mechanism to --

disclose biases and logical inconsistencies, to explore a witness' premises and assumptions, and to reveal value judgments behind purportedly objective statements.³⁸

Finally, the use of notice and comment procedures for ratemaking purposes has been strongly criticized by leading scholars.³⁹ Consistent with this view, no other federal agency has adopted notice and comment procedures to set individual rates or to prescribe a rate of return. The conclusion is obvious: From both academic and reality perspectives, the use of notice and comment procedures in prescribing rates or rate of return is a bad idea.

B. There are Benefits to Maintaining a Paper Hearing Structure.

There are good reasons why a "paper hearing" structure should be retained. A "paper hearing" process provides greater flexibility and confidence in addressing the key fact issues. It best accommodates the uniquely detailed and expert materials needed to focus on this core ratemaking decision. "Notice and comment" does not draw the same quality of filings, nor does it afford affected carriers an opportunity to demand justification or to

³⁸ Kestenbaum, Rulemaking Beyond APA: Criteria for Trial Type Procedures and the FTC Improvement Act, 44 Geo. Wash. L. Rev. 679, 694 (1976).

³⁹ Davis at § 6:15; Nathanson, 75 Colum. L. Rev. at 726-33 (Nathanson suggests that the drafters of the APA would have been "shocked" to learn that ratemaking "would be subject to only section 553 of the APA." 75 Colum. L. Rev. at 731).